Civil Appeal No. 3A of 2022

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. MR. JUSTICE MUSSENDEN
CASE NUMBER 2019: No. 379

Sessions House
Hamilton, Bermuda HM 12

Before:

SIR CHRISTOPHER CLARKE, PRESIDENT
SIR ANTHONY SMELLIE, JA
SHADE SUBAIR WILLIAMS, JA (Acting)

Between:

DENISE PRISCILLA TREW

Applicant

- v -

(1) HSBC BANK BERMUDA LIMITED
(2) DENNIS WILLIAM DWYER
(as Executor of the Estate of Robert Allen Trew)

Respondents

Appearances: Mr Michael Scott, Browne Scott, for the Applicant
Mr Dantae Williams, Marshall Diel & Myers Limited, for the 1st Respondent

Date of Ruling: 15 August 2025

RULING

Application for Leave to Appeal against Judge's striking out of the claim – guiding legal principles on the Court's power to strike out- the duty of a mortgagee bank in exercising a power of sale

SHADE SUBAIR WILLIAMS, JA (Acting)

1. This is our decision in answer to a written application made by Mrs. Denise Trew (the "Applicant"/ "Mrs. Trew") for leave to appeal against the 28 July 2021 decision of Mussenden J (now Chief Justice) by which he struck out all of her claims for breach of duty against HSBC Bank Bermuda Limited ("HSBC"/ the "Bank"). Those claims were brought by Mrs. Trew in proceedings commenced by a Specially Indorsed Writ of Summons filed on 18 September 2019 (the "Writ").

2. The facts alleged in the Writ make complaint of HSBC's enforcement of a mortgage by the sale of mortgaged property in which the Applicant had a life interest pursuant to the Last Will and Testament (the "Will") of Mrs. Trew's late husband, Mr. Robert Allan Trew. The proceedings in which HSBC enforced its rights in respect of the sale of the mortgaged property were commenced by an Originating Summons filed on 20 April 2016 in Civil Case No. 150 of 2016 (the "mortgage proceedings"). Both Mrs. Trew and Mr. Trew's executors, (the "Trew Estate" / the "Estate") were named as defendants in those proceedings.

Factual Background

The Mortgage Proceedings in Civil Case No. 150 of 2016

3. The property in question, known as The Old Armory Building, located at 6 York Street, St. George's, (the "Property"), became the subject of an equitable mortgage made on 12 January 1996. The mortgage arose in the form of security for the principal sum of $325,220.00 borrowed by Mr. Trew who later died on 20 June 1999. HSBC was the lender and mortgagee. Upon Mr. Trew's death, and in accordance with the terms of the Will, Mr. Dennis Dwyer and two other persons were appointed as executors of the Trew Estate. Mr. Dwyer (the "Executor") was the Estate's representative in the mortgage proceedings.

4. The Will of 23 June 1998 directed, by clause 9, that Mrs. Trew be gifted with a life interest in the Property. Upon her death several of Mr Trew's children were to inherit interests in the Property in varying percentages. Shortly after Mr. Trew's death, the Trew Estate became delinquent on the loan payments owed to HSBC. The Applicant, keen to retain possession of the property in which she held a life interest, asked the Bank not to enforce the equitable mortgage and to allow her to pay for the loan. She entered into negotiations with HSBC throughout 2012 to 2016, with a view to allowing

her to retain possession. However, repayment on the loan continued to be outstanding resulting in HSBC's filing of Civil Case No. 150 of 2016. In a letter of 19 May 2016 Mr Dwyer, the Executor, informed Marshall Diel & Myers, attorneys for the Bank, that, so far as he was concerned, Mr Trew's estate had no assets whatever as these had been distributed pursuant to the terms of the Will.

5. The relief sought under RSC Order 88 was for a money judgment for the principal sum of $105,922.64 plus interest at the rate of 3% per annum, making $169,287.72 in total, being the total outstanding as at 7 April 2016. The continuing interest claimed under the Originating Summons at a per diem rate was $30.15. The Bank also sought an Order for possession by the foreclosure of the equitable mortgage. The prayer for possession was made as follows:

> "*A direction from this Honourable Court that the Defendants convey each and all of their respective estates or interests in the mortgaged property to the Plaintiff and that each of the Defendants should then stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of in and to the mortgaged property*…"

6. In the supporting affidavit evidence from Ms. Adenike Carmichael, sworn on 19 April 2016, she deposed that Mr. Trew, as the mortgagor, borrowed the principal sum of $325,220.00 which was secured by both a promissory note and an equitable mortgage over the Property. The promissory note, dated 12 January 1996, was exhibited to her affidavit and the equitable mortgage was said to be evidenced by the deposit of the title deeds of the Property with the Bank on or about the same date as the promissory note. Ms. Carmichael also exhibited a copy of the Will and a copy of the Certificate of Grant of Probate dated 11 August 2000. She also recorded that the payment terms of the loan consisted of monthly blended payments of principal and interest in the amount of $ 3,400.

7. Ms Carmichael recorded that on or around 29 January 2001 a lump sum payment (amount unspecified) was applied to the loan from Mr Trew's estate, and that thereafter all payments were made between January 2001 and October 2003. She then set out such monthly payments as had been made by Mrs Trew, in varying amounts, between November 2003 and March 2009. Having set out these particulars, Ms. Carmichael deposed that since 2 March 2009, the Bank had not received any payments, and that, as at 7 April 2016, the amount outstanding was $105,922.64 by way of principal and $ 63,365.08 by way of interest which was accruing at a *per diem* rate of $ 30.15 i.e. the amounts referred to in the Originating Summons. The position taken by the Executor was that the Trew Estate was insolvent after having made distributions in accordance with the instructions made under the Will. The Bank thereafter resumed discussions with Mrs. Trew who remained determined to retain possession of the Property.

8. However, on 7 December 2017, at a hearing attended by Mrs Trew's counsel[1] and by Mrs Trew, Hellman J made an Order granting the Bank the monetary relief prayed for in its Originating Summons and an order for foreclosure of the equitable mortgage, a declaration that the Bank was entitled to enforce the mortgage by a sale of the Property and an order that the defendants should give the Bank possession thereof, such power of sale and possession to be stayed for 30 days from the date of the order. A possession order was made the following month on 17 January 2018 in respect of the Property. The writ of possession was executed by the Provost General Marshall on 15 May 2018. Mrs. Trew was there and, according to an endorsement of the writ of possession "*quickly left on commencement of possession".*

9. On 7 November 2018 the Bank sold the Property for $ 550,000.

Mrs. Trew's writ action against HSBC and the Executor and HSBC's Strike-Out Summons

10. 10. These are the proceedings with which we are concerned, insofar as they relate to the claims against HSBC only.

11. The relevant claims against HSBC may be distilled to the following complaints made by Mrs. Trew:

    (1) The Bank was not empowered by the December 2017 Order to affect a conveyance of the Property.

    (2) Alternatively, the December 2017 Order granting the power was invalid.[2]

    (3) The sale of the Property was an act of bad faith on the part of the Bank to the extent that it was carried out at an undervalue of the Property's market price. Reliance was placed in the Statement of Claim on the fact that an individual, referred to as "Mr S", had between 10 October and 5 November 2018 made successive offers to purchase the Property for $ 560,000; $ 575,000; $ 585,000; and $ 595,000.

[1] As the order of Hellman J records. Mussenden J said that the counsel was Mr Scott. Mrs Trew says that this was not correct, and that Mr Dwyer purported to act for her but – she says – was conflicted. This seems doubtful. Mrs Trew had engaged Mr Scott by at least 1 November 2016 and MDM recorded in its skeleton argument that it was he who represented her. It is not necessary to reach a conclusion on this issue.

[2] This was the way in which the first two points made were summarised by Mussenden J, adopting the phraseology of paragraph 21 of the Bank's skeleton argument before him. What was in fact pleaded was that the Bank's "*purported disposition of the said Armory Building was made in circumstances where the first defendant bank did not have legal title to the property in virtue of their holding an equitable mortgage only, as a result the First Defendant's said purported conveyance to the undisclosed purchaser was void*."

(4) Mrs. Trew suffered damage as a result of the act of bad faith on the part of the Bank. The principal claim against the Bank is for $ 425,712.28, which is said to be the loss of the value of the deal, being the difference between the $ 595,000 figure and the debt of $ 169,287.72: see para 10.1.[3]

12. By a summons application dated 7 January 2021, HSBC applied to have the Writ (as it applied to the claims against HSBC) struck out pursuant to RSC Order 18/19 and /or the inherent jurisdiction of the Supreme Court. The grounds relied on were:

> "*i. Neither the indorsement of the Specially Indorsed Writ of Summons nor the Statement of Claim disclose a reasonable cause of action against the First Defendant; further or in the alternative;*
>
> *ii. That the said indorsement and Statement of Claim as against the First Defendant are scandalous, frivolous or vexatious; further or in the alternative;*
>
> *iii. That the said Indorsement and Amended Statement of Claim as against the First Defendant are an abuse of the process of the Court*."

13. During the course of the strike-out application before Mussenden J, which he granted on 28 July 2021, Mrs. Trew withdrew the claims summarised under numbers 11 (1) and (2) above and sought leave to amend4 the Statement of Claim to reflect that: see paragraph [14] of her affidavit of 5 February 2021. Otherwise defending the soundness of her pleaded case, Mrs. Trew maintained her claims on the issue of bad faith and resulting damage.

14. The complaints summarised under numbers 11 (3) and (4) above assumed the following underlying assertions, included either in the original Statement of Claim or Mrs Trew's affidavit of 5 February 2021 in response to the application to strike out:

a) Mrs. Trew was entitled to receive the net proceeds of the sale of the Property (as she would be under clause 6 of the Will). The Bank failed to provide her with an adequate, proper or full account of the sale transactions carried out in relation to the Property, including the sale of the Property made under the order of 7 December 2017;

b) The Bank owed a duty to Mrs. Trew to exercise good faith, fairness and reasonableness in affecting the sale of the Property;

[3] For some reason paragraph 11 has a figure of $ 425,917.28. Further, any claim would have to take account of the fact that the loss arising from the loss of the deal would be the amount of the deal which, it is said, would have been reached less the $ 550,000 for which the Property was, in fact, sold.
[4] Notwithstanding, a formal Amended Statement of Claim was not filed.

c) The Bank breached its duty owed to Mrs. Trew to exercise good faith, fairness and reasonableness in effecting the sale of the Property by failing to sell the Property at the highest market price offered in writing by bidders;

d) The Bank owed a statutory duty to Mrs. Trew, as an eligible creditor within the meaning of section 36C (1) of the *Conveyancing Act 1983*, (the '1983 Act') to ensure that the disposal of the Property was not made:

i) with the "requisite intention" nor
ii) at an "undervalue"

e) The Bank breached its duties, thereby causing Mrs. Trew to suffer loss and damage.

15. Section 36A(1) of the 1983 Act provides the following definitions for the terms "eligible creditor", "requisite intention" and "undervalue":

> "*eligible creditor" means a person to whom –*
>
> *(a)on, or within two years after, the material date the transferor owed an obligation and on the date of the action or proceeding to set aside the relevant disposition that obligation remains unsatisfied.*
> *(b)…*
> *(c)…"*
>
> *"material date" means the date on which a relevant disposition is made;*
>
> "*"requisite intention" means an intention of a transferor to make a disposition the dominant purpose of which is to put the property which is the subject of that disposition beyond the reach of a person or a class of persons who is making, or may at some time make, a claim against him.*
>
> *"undervalue", in relation to a disposition of property, means a disposition in respect of which— no consideration is given; or the value of the consideration given is, in money or money's worth, significantly less than the value, in money or money's worth, of the property*."

The Application for Leave to Appeal

16. Mussenden J having struck out her claims described above on 21 July 2021, the proposed grounds of appeal are set out in Mrs. Trew's Notice of Motion for Leave to Appeal of 19 August 2021 filed on 23 August 2021. Mrs Trew has also expressed her case in an affidavit of 5 February 2021 and in submissions before this Court. What is said in these documents is of a somewhat varying nature such that it is not always easy to discern exactly what case is being advanced. I endeavour in this judgment to deal with what I take to be Mrs. Trew's essential points.

The Legal Test for the Granting of Leave to Appeal

17. The legal principles applicable to applications for leave to appeal were most recently addressed by this Court in *Trew v White and White* [2025] CA Bda 21 Civ (15 August 2025) and *Credit Suisse Life (Bermuda) Ltd v Mr. Bidzina Ivanishvili* [2020] BM 2020 SC 43. *See, also, Apex Fund Services Ltd v Clingerman* [2020] SC (Bda) 12 Com.

18. The ultimate question at this stage is whether the Applicant has established an 'arguable' case by way of appeal. That does not require us to scrutinize the merits of the appeal grounds for any purpose other than to weed out the claim if it has no realistic possibility of success. Much like the judicial probe required for a strike-out application, the assessment of applications for leave to appeal forms part of the Court's paramount duty to ensure that the Court's resources are not exhausted by litigants who have plainly hopeless claims. This, as explained in *Trew v White and White*, lends a starting bias in favour of the Applicant, as the Court, at this stage, is not concerned with the strength of the claim as much as it is concerned with the extraction of irreparably incompetent claims.

Grounds 1, 3, 4 and 7:

19. These proposed grounds of appeal may be collectively addressed as they each make complaint that the judge's approach to the strike-out application was misaligned with the relevant legal principles governing the Court's jurisdiction to strike out a claim. The proposed grounds are pleaded as follows:

Ground 1.

"*Miscarriage of Justice. The Learned Judge erred in law and mis-directed himself (para 66 Ruling reasons for Strike Out) as to the proper test when considering whether the Plaintiff's claim should be struck out.*

The legal test "does the claim have a real prospect of success?" (See Swain v Hillman [2001] 1 ALL ER 91, 92, Lord Woolf MR)"

Ground 3

"*The Learned judge erred in law and misdirected himself (para 66 of Ruling) when making his primary finding that the Plaintiff lacked standing for the action against the bank which is a difficult point of law not suitable for summary determination at the strike-out stage.*

Ground 4

"*The Learned judge's decision to strike out was materially flawed in law in that the claim by the Plaintiff against the Bank was not incontestably bad as the law requires but was a viable*

and arguable action on the face of the pleadings including the particularized and extensive Defence filed by the Bank, and the strike out was both unfair and contrary to justice."

Ground 7

"*The Learned judge's initial misdirection on what is the proper legal test when considering whether to strike out led him into further and continuing error at paragraph 68 of his Ruling when finding that the bank exercised 'good faith' when accepting the offer for the said property at an under value LN 7 and when further misdirecting his mind on the legal test for Strike out of any claim found that the reference to possible collusion on the part of the bank was mythical and amount to an abuse of process and amounted to his taking into account irrelevant and overlooking relevant matters*."

The Law on Strike Out Applications

20. RSC Order 18/19 provides:

> "*18/19 Striking Out pleading and indorsements*
>
> *(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—*
>
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
>
> *(b) it is scandalous, frivolous or vexatious; or*
>
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
> *(d) it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*
>
> *(2) No evidence shall be admissible on an application under paragraph (1)(a).*"

21. The legal principles applicable to strike-out applications have been fully rehearsed in numerous previous judgments. In *David Lee Tucker v Hamilton Properties Limited* [2017] SC (Bda) 110 Civ (11 December 2017 the Court generalised the purpose of its jurisdiction to determine whether or not to strike out a claim. Sitting as a judge of original jurisdiction, I stated [11] and [14]:

> *"11. ...In general synopsis, strike out applications ought not to be misused as an alternative mode of trial. It is not a witness credibility or fact-finding venture and for good reason. The evidence before the Court at this stage is not oral and has not yet been tested through cross-examination. A strike out application, in reality, is a component of good case management. Where the pleadings are so bad on its face and so obviously bound for failure, the Court should strike it out.*

> …
> 14. *The Court's determination of a strike-out application is a component of active case management. Essentially, the Court is required to identify the issues to be tried at an early stage of the proceedings and to summarily dispose of the others. This is aimed to spare unnecessary expense and to ensure that matters are dealt with expeditiously and fairly.*"

22. In *Wenlock v Moloney* [1965] 1WLR the English Court of Appeal reversed a strike-out ruling which had originally been made by a master and upheld on review by a judge in chambers. In reference to the original four-day hearing entailing extensive scrutiny of untested evidence under a claim of conspiracy to deprive the plaintiff of his shares and interest in a company, Diplock LJ famously said [1244] D-E:

> "*But this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers on affidavits only, without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.*"

23. This passage from *Wenlock v Moloney* appears as a quote in a number of reported judgments from this Court and the Supreme Court. (See *Chiang and Pacific Challenge Holdings Limited v Kistefos Investment* [2002] Bda LR 55, per Astwood P and *Kingate Global Fund Limited (In Liquidation) v Kingate Management Limited* [2016] Bda LR 4, per Hellman J). It sets the framework for the Court's assessment of an application to strike out under Order 18 r 19 and the approach to be taken by the Court has been expressed in different ways.

24. Where an application is grounded on an asserted failure to disclose a reasonable cause under RSC O.18/19(1)(a), the Court's powers should be reserved for cases where it is clear and obvious that there is no realistic possibility of establishing a cause of action, whether on the current pleadings or on prospective amended pleadings, which correlates with the facts as alleged. The question as to whether the pleadings show a reasonable cause of action does not call for an examination of affidavit evidence; rather it merely requires a judge to assess the pleading on its face. The assessment of the pleading, however, simply raises the question as to whether there is some chance of success at trial. A chance of success need not be a strong one and will likely depend on how the evidence and issues of credibility unfold and are applied to the relevant law. However, the case should be struck out where the chance of success is so obviously low that not only would it be plainly unfair to drag the opposing party through the time and expense of a trial but that it would also be a misuse of the Court's time and resources. The White Book (1999 edition) provides [18/19/10]*:*

> *"A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 WLR 688; [1970] 1 All ER 1096, CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out (Moore v Lawson (1915) 31 TLR 418, CA; Wenlock v Maloney [1965] 1 WLR 1238; [1965] 2 All E.R. 871, CA): …"*

25. Where O.18/19(1)(b) is the basis of the application, i.e. that the pleading is scandalous, frivolous or vexatious, the claim will be struck out as scandalous in cases where it is plain to see that the pleadings are "*grossly disgraceful, false and malicious or defamatory*" (See *David Lee Tucker v Hamilton Properties Limited*). It may be struck out as "*frivolous or vexatious*" if it is obviously of that character or obviously unsustainable: per Lindley L.J. in *Attorney General of Duchy of Lancaster v L. & N. W. Railway* [1892] 3 Ch. 274 at 277.

26. Applications asserting prejudice, embarrassment or delay under RSC O.18/19(1)(c) require a judge to centralise the Court's attention to the impact the impugned pleadings would have on the constitutional fairness of the trial of the action. On these grounds, the Court will likely be more concerned with the fairness of proceeding to trial on the pleading in question, even if the claim not only survives the reasonable cause of action threshold but also proves to be outside the realm of a scandalous, frivolous or vexatious pleading. On these grounds, the Court is ultimately tasked to step back and consider whether the prosecution of the pleading amounts to deprivation of a fair trial.

27. Finally, questions as to abuse of process under RSC O.18/19(1)(d), much like questions as to the overall fairness of the trial process, render it necessary to look at all of the circumstances of the case, beyond the drafting of the pleading in question. However, it will rarely, if ever, be appropriate for a judge to be lured into determining the viability of a claim based on a view of the pleaded facts which have yet to be fully developed or tested under trial examination or based on a view of the credibility of witnesses who have yet to take the stand at trial (see *E (a minor) v Dorset CC* [1994] 4 ALL ER 640 at 649, per Sir Thomas Bingham MR).

28. Consistent with the position as stated by Auld LJ in *Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick* [1999] EWCA Civ 1247 p.613 this Court in *Broadsino Finance Co Ltd v Brilliance China Automative Holdings Ltd* [2005] Bda LR 12 said:

> "*In Electra Private Equity Partner .. Auld LJ sa*id "*It is trite law that the power to strike-out a claim under RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the*

> *inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases…to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits…There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation…"*
>
> *However, the court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in a state of development. It should only strike out a claim in a clear and obvious case. Thus, in McDonald's Corp v Steel [1995] 3 ALL ER 615 at 623, Neill LJ…said that the power to strike out was a Draconian remedy which should be employed only in clear and obvious cases where it was possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof."*

Did the Judge misdirect himself on the test applicable to an application to strike out the claim?

29. I now turn to Mussenden J's statement of the law and relevant legal principles. At paragraph 44 of his Ruling, the Judge properly refers to the Court's jurisdiction under RSC Order 18/19 with reference to broadly the same body of case of law outlined further above.

30. At paragraph 56 of his Ruling, the Judge correctly pointed out the Court's inherent jurisdictional powers and the admissibility of affidavit evidence under both the Court's inherent jurisdiction and the grounds listed under RSC O. 18/19 (b)-(d), stating:

> "*Inherent jurisdiction of the Court*
> *56. The Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexations* [sic] [vexatious] *or an abuse of process. The power to strike out a pleading under the inherent jurisdiction of the Court is separate and apart from the power set out in RSC Order 18/19, but it is also a discretionary* [sic]. *Similar to Order 18/19 (c) through (d), when an application is made under the inherent jurisdiction* [of] *the Court to strike out a pleading on the basis that it is obviously frivolous or vexations* [sic] [vexatious] *or that it is bound to fail, affidavit evidence is admissible*."

31. The impugned and relevant passages of the Judge's ruling provide [66]-[70]:

> "*66. In my view, the action should be struck out for several reasons. First, the Privy Council cases of Downsview Nominees Ltd v First City Corpn Ltd and*

Parker Tweedale v Dunbar Bank plc and others (No. 1) which are binding on this Court establish that the duty of care by the Bank is to the mortgagor and to all subsequent encumbrancers of the mortgaged property and not to a beneficiary of the mortgagor. In my view, I agree with Mr. Hindess that the mortgagor was the Estate of Mr. Trew as represented by his Executor, the Second Defendant. The Plaintiff was not the mortgagor or an encumbrancer of the Property. I am obliged to reject Mr. Scott's submission that the Plaintiff obtained an equitable interest because the Bank looked to her for payments. The affidavit evidence states that the Bank tried to work with the Plaintiff for several years in order to have the mortgage repaid. There is no authority to support the contention that this changed the Plaintiff's position in respect of the mortgage. The extract about the "Torrens Title Jurisdictions" is an article that is not relevant to this application as it is not an authority on anything material or otherwise. On this basis, the Plaintiff does not have standing for this part of the action against the Bank. In my view, the claim is bound to fail and therefore should be struck out as against the Bank as it is discloses no reasonable cause of action and is frivolous or vexatious because it is obviously unsustainable.

67. Second, on the same basis as set out above, I extend similar reasoning to the arguments about the lack of an accounting. There is no duty owed by the Bank to the Plaintiff for the value of the Estate of Mr. Trew as that is a matter of the Second Defendant. In respect of the sale of the Property, the Bank's duty was to inform the Second Defendant about the details of the sale and forward any surplus to the Estate. In my view, it is plain and obvious that this part of the claim should be struck out for presenting no reasonable cause of action and being frivolous or vexatious and an abuse of the process of the Court.

68. Third, again on the basis as set out above, I extend my reasoning to the arguments about the Bank's duty to exercise good faith, fairness and reasonableness in the sale of the Property as well as to the aspects of the claim about the interest. The pleadings and affidavit evidence set out the conduct of the bank. The decisions were a matter of simple mathematics in comparing offer prices to purchase the Property. On the basis that Mr. Scott is not challenging the factual basis of the offers, in my view he will be hard pressed to overcome the hurdle before him to show that the Bank did not exercise good faith, fairness and reasonableness in the conduct of the sale of the Property. The Plaintiff in Trew 1 alleges an indication of collusion, possible corruption, asset manipulation and improper selection of purchasers by the Bank. Accordingly, Mr. Scott has dived off the high board with fine form to create a splash about fraud in respect of an appraisal and some offers all landing on $550,000 but then he resurfaces to state that he does not actually allege fraud, which in any event is not pleaded generally or specifically. In doing this, in my view, the Plaintiff and Mr. Scott have leapt into the pool of the mythical as anticipated in the case of Dow Hager Lawrance v Lord Norreys and Others, such myth which appears to have grown with the process of the litigation.

69. Fourth, in my view, the Bank complied with its duty to obtain the best price. The start point is that the Bank does not have a duty to the Plaintiff for the reasons as set out above. The next point is that I disagree with Mr. Scott's extensive submissions about the sale price of the Property. The evidence gives

a chronology of the offers and the reasons why they were approved or rejected. Mr. Scott stated that he accepted the facts of the offers but challenged why the Bank accepted the offer that he did on the basis that it was not the highest offer. The evidence shows that the Bank carried out a comparable analysis of the "net net" offer with the "gross" offers and exercised their discretion as to what was the proper price. In following the case authorities of Keerome Maybury v Keetha Lowe et al and Michael v Miller the exercise of the discretion of the Bank to accept the price that it did was unimpeachable such that in my view this part of the action is bound to fail. There is no other evidence to counter the facts or the reasoning in reaching the price. In my view, this part of the action should be struck out as it discloses no reasonable cause of action, is frivolous and vexatious and is an abuse of process.

70. Fifth, in respect of Section 36C of the 1983 Act, in my view, I accept that the law as stated by the Privy Council is clear that the Bank as mortgagee owed no duty or obligation to the Plaintiff and therefore the Plaintiff cannot be an "eligible creditor" under the Act. Also, from the facts and evidence, there is insufficient evidence to support the contention that the requisite intention necessary for the Plaintiff to advance a claim under this part of the Act did exist. Furthermore, for the reasons set out above, the claims about the sale price are bound to fail. In light of these reasons, this part of the Plaintiff's claim against the Bank should be struck out as no reasonable cause of action, is frivolous and vexatious and is an abuse of process.

Conclusion
71. For the reasons above, the Plaintiff's claims against the Bank should be struck out for the reasons stated. Further, in my view, good case management requires that in claims such as the present, which are bound to fail, they should be struck out and I am obliged to use the inherent jurisdiction of the Court to do so. I have taken into account all the circumstances of the Plaintiff's case against the Bank and I note that the power to strike out should be exercised sparingly and only in plain and obvious cases per the authorities and principles set out above. In my view, these are the kinds of claims as against the Bank, which as a result of the mortgage had the authority to sell the property for a proper price and pay any surplus to the estate, which should be struck out.

72. Mr. Scott has submitted that rather than striking out the action against the Bank, that the Court should grant leave to amend the Writ and Statement of Claim. In my view, any amendments will not change the critical facts of this case, namely that the Bank did not owe a duty to the Plaintiff and the Property was sold for a proper price within the bounds of the authorities. On that basis, any amendments will be of no material significance or merit to ward off a strikeout application. On that basis, I decline to grant leave to amend."

32. On Ground 1 it is suggested that Mussenden J misstated the position relating to the legal test governing the Court's power to strike out a claim. Clearly, the Judge understood that the test for striking out the claim is measured in the terms and grounds listed under RSC Order 18/19. At paragraph 66 the judge expressly granted the strike out application

using the language under the Rule: "*discloses no reasonable cause of action and is frivolous or vexatious because it is obviously unsustainable*".

33. What is plainly key to these grounds of complaint against the Judge is the contention that he did not apply, or that he wrongly applied, the relevant legal principles. In doing so, he sought to determine the following substantive questions of both fact and law:

A. Whether the Bank, as the mortgagee of the Property, owed a duty in equity or at common law to Mrs. Trew by virtue of her life interest in the Property;

B. Whether the Bank, as the mortgagee of the Property, owed a statutory duty under section 36C of the Conveyancing Act to Mrs. Trew by virtue of her life interest in the Property;

C. If any such duty was owed to Mrs. Trew, whether the facts establish that the Bank fulfilled its obligations.

Whether the Bank arguably owed a duty to Mrs. Trew in equity or at common law

34. Citing *Downsview Nominees Ltd v First City Corporation Ltd* and *Parker Tweedale v Dunbar Bank plc and others (No. 1)* [1993] 3 ALL ER 626 as binding law, the Judge determined that the Bank owed no statutory or other duty to Mrs. Trew but that it did owe a duty to the Trew Estate as the mortgagor of the Property. On Mussenden J's findings, Mrs. Trew, was a beneficiary of the mortgagor since she was a life tenant of the Property of the Estate but she had no right of action against the Bank on that account. The Judge rejected Mr. Scott's invitation for him to attach significance to the relationship which had formed between the Bank and Mrs. Trew through the years of negotiation efforts. The Judge considered it to be irrelevant that the Bank was willing to receive payments directly from Mrs. Trew in order for her to retain her life interest in the property.

35. The Privy Council in *Downsview Nominees Ltd v First City Corporation* was concerned with the scope of a duty in equity owed by a mortgagee to the mortgagor and all subsequent incumbrancers of the same mortgaged property. That expression of the duty required the mortgagee to act in good faith for the special purpose of enabling the assets compromised in the security for debt to be preserved and realized for the purpose of obtaining repayment of the debt[5]. In the decision delivered by Lord Templeman, with

[5] The nature of the duty has been expressed in a number of cases: "*a duty to act fairly towards the mortgagor….and the Bank must get a fair price*" **HSBC Bank Bermuda v John Percival White** (2017); "*In the exercise of his rights over the security the mortgagee must act fairly towards the mortgagor….he is not entitled to conduct himself in a way which unfairly prejudices the mortgagor.. …he must exercise reasonable care to sell only at the proper market value*"; **Palk v Mortgage Services Funding PLC** [1993] 1 Ch D 330; "*A mortgagee .. is subject to an equitable duty to act in good faith and to obtain the best price reasonably obtainable at the time he decides to sell*; **Raja v Austin Gray** [2002[EWCA Civ 1965 at [55] *;* ***Keerome Maybury v Keetha Lowe et***

whom there was unanimous judicial agreement from the other members of the Board, it was held that the duty arose because if a mortgagee committed a breach of his duties to the mortgagor, the damage inflicted by that breach of duty would be suffered by any subsequent incumbrancers and the mortgagor, depending on the extent of the damage and the amount of each security.

36. The facts in *Downsview Nominees Ltd v First City Corporation* underlying the resulting duty in equity applied to the entitlement of an incumbrancer over the mortgaged property in question. The first plaintiff in that case had acquired a debenture from the mortgagor company after a previous debenture had been issued and was ultimately assigned to the first defendant. After some discord with the plaintiff on its rights as the subsequent incumbrancer, the first defendant secured a third debenture on terms which put it in preference to all other claims in the receivership of the mortgagor company. In the position of mortgagee preserving and realising the assets for the purpose of obtaining repayment, the first defendant was found to owe a duty in equity to the first plaintiff. The duty was owed because the first plaintiff, as a subsequent incumbrancer, could stand to be deprived of its entitlement to its own fruits from the mortgaged property if the first defendant mortgagee battered [check] the mortgaged property in bad faith under the guise of collecting what it was owed.

37. Mussenden J also cited the case of *China and South Sea Bank Ltd v Tan* [1989] 3 ALL ER 839. In that case, the appellant bank loaned a company $ HK 30M which was secured by shares in that company. The respondent guaranteed the loan as a surety. When the company defaulted on the loan, the value of its shares was sufficient to satisfy the debt. However, the shares subsequently became worthless, and the mortgagee bank called upon the respondent to make the repayment. The respondent refused to make payment on the grounds that the bank breached a duty owed to the respondent to realise the shares when they were redeemable at a value sufficient to satisfy the debt. The Privy Council ultimately found that the tort of negligence could not intervene to supplant the principles of equity or co-exist with the existing contractual promises or statutory rights. Plainly put, the surety's rights were dependent only on the principles of equity which confined the bank's duty to ensure that it did not injuriously surrender or otherwise wrongly cause the security to be lost.

38. Mussenden J was also referred to *Parker-Tweedale v Dunbar Bank plc and others (No. 1)* [1990] 2 ALL ER 577. He erred in describing the decision as binding law. That was an English Court of Appeal case which, is not binding on any Bermuda Court. (See *Trew v White and White*). It is, however, highly persuasive, particularly since the Appeal Committee of the House of Lords refused permission to appeal from it. I would regard it as a decision which we should follow, consistent as it is with the Privy Council decision of *China and South Sea Bank*, which in *Parker-Tweedale* the Court applied.

***al** at [39; **Michel v Miller** [2004] EWCA Cic 282 at [131]*. The duty is owed to a surety: **Standard Chartered Bank Ltd v Walker** [1982] 1 WLR 141, where the English Court of Appeal made a tortious analysis, despite relying on **Cuckmere Finance.**

39. In that case, a husband and wife purchased a property known as Ditchford Hill Farm for £248,000.00 which was registered solely in the wife's name as a condition of her agreement to relocate from Cobbham, Surrey to Gloucestershire in circumstances where the marriage was breaking down. The purchase was made in three stages, each with the aid of a mortgage to the bank by the wife which charged the property with all the borrowings made by the plaintiff husband or his wife. The husband executed a statutory declaration declaring that he occupied the property as a licensee under a licence determinable at will and that any of his rights to share in or occupy the property would be postponed and made subject to the rights, interests and remedies of the bank as the mortgagee. Under that same declaration the husband agreed that he would not assert or maintain against the bank any rights interests or claim in equity as an overriding interest or otherwise. As explained by Nourse LJ, the practical effect of the statutory declaration was to deprive the plaintiff husband from asserting a right against the bank to remain in possession of the property.

40. Thereafter, the husband and wife defaulted on the loan from the bank. The bank took possession of the property and accepted a sale offer in the sum of £575,000.00 by a purchasing development company who subsequently resold the property one week later to a new purchaser for the sum of £700,000.00. The husband, claiming a beneficial interest in the property and an entitlement to assert a duty owed by the bank to obtain a proper price for the property, commenced Court proceedings which proceeded to trial, having survived a strike out application.

41. On the question of the husband's beneficial interest in the property, the first instance judge, Gibson J, found that the effect of three separation agreements between the husband and the wife entitled the husband to the surplus proceeds of the sale of the mortgaged property, once the bank had been repaid in the amount of the debt secured on the Ditchford property and another property which had been acquired for the wife. In summary, the plaintiff's interest would arise once the property was sold and not beforehand.

42. What is key in these decisions is the widespread judicial recognition given to a duty owed on equitable principles to a mortgagor by a mortgagee. It is clear from the authorities that such a duty does not arise under the tort of negligence but is one which is recognised by equitable principles. At [582] Nourse LJ in *Parker-Tweedale v Dunbar Bank plc* stated:

> "*In my respectful opinion it is both unnecessary and confusing for the duties owed by a mortgagee to the mortgagor and the surety, if there is one, to be expressed in terms of the tort of negligence. The authorities which were considered in the careful judgments of this court in Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd. demonstrate that the duty owed by the mortgagee to the*

> *mortgagor was recognized by equity as arising out of the particular relationship between them. Thus Salmon L.J. himself said, at page 967D:*
>
> > *"It would seem, therefore, that many years before the modern development of the law of negligence, the courts of equity had laid down a doctrine in relation to mortgages which is entirely consonant with the general principles later evolved by the common law".*
>
> *The duty owed to the surety arises in the same way. In The China and South Sea Bank Ltd. v. Tan (13th November 1989) Lord Templeman, in delivering the judgment of the Privy Council, having pointed out that the surety in that case admitted that the moneys secured by the guarantee were due, continued:*
>
> *"But the surety claims that the creditor owed the surety a duty to exercise the power of sale conferred by the mortgage and in that case the liability of the surety under the guarantee would either have been eliminated or very much reduced. The Court of Appeal [in Hong Kong] sought to find such duty in the tort of negligence but the tort of negligence has not yet subsumed all torts and does not supplant the principles of equity or contradict contractual promises…Equity intervenes to protect a surety".*"

43. The duty which is recognized by equity's intervention is fact-sensitive and arises out of the particular relationship between the mortgagor and the mortgagee. As Purchas LJ put it in his supporting judgment [587]:

> "*The question whether there was a direct duty owed by [the bank] to the plaintiff depends upon whether a sufficiently close relationship can be established in the light of the existing authorities. The proposition put as a broad principle is that the mortgagee exercising the rights of sale of a property subject to the mortgage owes a duty to a beneficiary of a trust upon which the mortgagor holds that property, of whose interest the mortgagee is aware. The duties on a mortgagee exercising a power of sale were considered in Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] Ch 949 and have already been set out in the judgment of Nourse LJ. There is no room for the superimposition on the duty owed to the mortgagor of a further duty owed by the mortgagee directly to the beneficiary in these circumstances."*

44. What Mrs. Trew seeks to argue is that a duty in equity was owed by the Bank, which she can enforce. To that end, she would have to establish that she qualifies under an exception which permits a beneficiary of the mortgagor to take over the rights of the trustee (or executor) of a mortgagor against a third party, i.e. the Bank, which has or may have caused loss to the trust assets. Such an exception has been recognized, notwithstanding the general principle that a mortgagee owes no direct duty to the beneficiary of a trustee mortgagor. That general principle was succinctly stated in the judgment of Purchas LJ [587]:

> "*The beneficiary's rights are against the mortgagor as trustee upon whom there is a duty to take reasonable care to preserve the assets of the trust but that this*

> *does not extend to give a right of action directly to a beneficiary against a third party who has, or may have, caused a loss to the trust assets.* ***The only circumstances in which a beneficiary can acquire a right against the third party in these circumstances is if he can take over the rights of the trustee as a result of the misfeasance of the latter and pursue any rights against a third party on behalf of the trust, but not in pursuance of any right enjoyed by him directly against the third party****— Hayim v. Citibank N.A. [1987] A.C. 730 at page 747. By analogy with the facts of the Pacific Associates Inc. v. Baxter case, in my judgment the law will not import a duty in tort to enlarge the rights of the beneficiary so as to create a duty owed to the beneficiary of the trust by a third party who may have acted to the detriment of the trust assets. The rights of a beneficiary have already been recognised and protected under the existing equitable principles dealing with the trust and the rights of the beneficiary against the trustee. As Nourse L.J. has already said the creation of a duty owed directly by the mortgagee to the beneficiary is both unnecessary and confusing, except where there are wholly exceptional circumstances.*"

45. In his judgment Nourse LJ had said this about the exception:

> *"The only exception for which counsel for [the bank] allowed was the special case where the trustee* ***has unreasonably refused to sue on behalf of the trust or has committed some other breach of his duties to the beneficiaries, e.g. by consenting to an improvident sale which disables or disqualifies him from acting on behalf of the trust. In such a case the beneficiary is permitted to sue on behalf of the trust****. This exception is established by a series of authorities, some of which were recently considered by the Privy Council in Hayim v Citibank NA [1987] AC 730. In delivering the judgment of their Lordships Lord Templeman said (at 748):*
>
> > *"These authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a* ***failure, excusable, or inexcusable, by the trustees in the performance of the duty owed by the trustees to the beneficiary to protect the trust estate or to protect the interest of the beneficiary in the trust estate"***

46. In that case the wife was the mortgagor of the property and she had consented to the sale by the bank for £ 575,000. The parties and the court accepted that that did not, of itself, preclude a claim by the beneficiary against the bank and that the question which the judge had ultimately to ask himself was whether there was a breach of trust by the wife in giving her consent to the sale.

47. Referring to other possible exceptional circumstances, Sir Michael Kerr in his concurring judgment said [586]:

> "*As I say, I merely record the argument; in view of the analysis and conclusions set out by Nourse L.J., with which I entirely agree, it is unnecessary to go further. In any event, the matter was in no way argued adequately and we do not have the necessary material to enable it to be dealt with in this*

> *case. However, if it can be shown that a beneficiary's claim against a mortgagor/trustee would be useless, either because the trustee has no assets or because all his assets are in some way held in trust for the beneficiary or for both of them jointly, then I can see that this might well give rise to a further exception, in addition to those referred to by my Lords, in particular if the mortgagee has notice of the situation*."

48. It does not seem to me that Mrs. Trew is entitled to rely on the exception referred to in the previous paragraph to sue the mortgagee Bank in her own right, because it is not apparent that the executors have no assets, even if they no longer possess any of the assets of the Estate. The other exceptions which, in the light of authorities, are potentially available are if the trustee/executors have been guilty of misfeasance by unreasonably refusing to sue the mortgagee on behalf of the estate or consenting to an improvident sale of the mortgaged asset.

49. It seems tolerably clear that the executors, who have not brought any claim against the Bank for several years, are not willing themselves to bring such a claim. In paragraph 2 of her grounds of application Mrs. Trew contends that the Judge erred in law in failing to consider whether the Executor wished to pursue a claim against the mortgagee or assign it to her. The Judge, indeed, makes no specific reference to this point; and, if the Executor unreasonably declined to proceed against the mortgagee, the exception from the general rule would be arguably applicable.

50. In those circumstances the critical question is whether the executors arguably had a valid cause of action against the Bank for failure to carry out its duties as mortgagee to the mortgagor/estate by selling the Property for only $ 550,000, which the executors have unreasonably failed to enforce (or cannot do so because they expressly or impliedly consented) but which Mrs Trew can now make on behalf of the estate. If that is arguable then Mrs Trew would, in my judgment, have a claim which should not be struck out. I shall consider this question further below.

51. Mrs. Trew also claims that she has a right to sue the Bank on the basis that a direct relationship was formed between her and the Bank when she paid off some of the mortgage debt which the Bank sought to recover from her. It does not seem to me that because she did so, there was a new legal relationship between her and the Bank; nor, as she suggests, that she is entitled to the return of the payments that she made on the basis that the Bank acted in some way tortiously in accepting them. It is not surprising that the Bank sought payment of the debt for which the mortgage was security from the only person with an immediate interest in the Property. But the fact that the Bank did so did not create some different legal relationship or convert Mrs. Trew into a mortgagor or a surety. In those circumstances I do not accept that the Bank was, for that reason, under any duty to account to her. Its obligation to account was owed to the mortgagor/executors. The second affidavit of Ms. Brown attests at [13] to the fact that the Bank has accounted to the executors.

52. In the submissions for Mrs. Trew it is said that the Judge erred in assigning contract obligations to her under the promissory note [under paragraph 10 of his judgment]. The reference in paragraph 10 of the judgment was to the Originating Summons in which there was a claim for payment of the amount outstanding under the mortgage, which had been served on Mrs. Trew and Mr Dwyer. Payment of this sum by both defendants was what was ordered by Hellman J. To order Mrs. Trew to make such a payment was, in my judgment, wrong. She was neither a debtor nor a mortgagor nor a surety; and her life interest in the mortgaged Property would not make her any of those. That said, the fact that judgment was given against her at the suit of the Bank was, in my view, arguably a special circumstance which permits her to sue the mortgagee for breach of duty6. It is arguable that Equity should not allow a mortgagee, who has obtained judgment in respect of the mortgage debt against someone other than the mortgagor or a surety for the mortgage debt, to deny that person the right to claim that the mortgagee has failed to fulfill his duties in respect of the sale of the mortgaged property, in circumstances where the mortgagor has failed to do so. Further, in such a case it would seem to me arguable that the mortgagee has a duty to account in relation to its attempts to sell the mortgaged property (but not otherwise). In relation to any claim to an account, it is difficult to see what further information the Bank could be said to need to provide, given the information that it has provided in the affidavits sworn in these proceedings. But there may be some further information about the negotiations leading up to the sale. Relevant documents would, in any event, be available on discovery.

Whether the Bank arguably owed a statutory duty to Mrs. Trew

53. The Judge also disposed of the Applicant's claim to be owed a statutory duty under the 1983 Act. At paragraph 70 of his ruling the judge held:

> "*Fifth, in respect of Section 36C of the 1983 Act, in my view, I accept that the law as stated by the Privy Council is clear that the Bank as mortgagee owed no duty or obligation to the Plaintiff and therefore the Plaintiff cannot be an "eligible creditor" under the Act. Also, from the facts and evidence, there is insufficient evidence to support the contention that the requisite intention necessary for the Plaintiff to advance a claim under this part of the Act did exist. Furthermore, for the reasons set out above, the claims about the sale price are bound to fail. In light of these reasons, this part of the Plaintiff's claim against the Bank should be struck out as no reasonable cause of action, is frivolous and vexatious and is an abuse of process*".

54. In order for Mrs Trew to be an "*eligible creditor*" within the meaning of section 36A(1) of the 1983 Act, the Bank would have to have owed her an obligation on the date of the sale of the Property or within two years thereafter. If, by reason of its obtaining a

6 This is the contention argued for (somewhat discursively) in Mr Scott's written submission to us on the application for leave to appeal.

judgment against her, the Bank owed her a duty to use reasonable care to obtain a proper price for the Property, that obligation existed at the date of the sale i.e. December 2018. But the first problem for Mrs Trew is that the remedy under section 36 is to set aside the relevant disposition. That is not a claim which is made in the Statement of Claim and the six-year period (after the date of the disposition\) for bringing an action to set the disposition aside laid down in section 36 C (3) (b) has expired. That, alone, is sufficient to make the section 36 C claim untenable.

55. Further there seems to me to be no realistic prospect of establishing that the Bank had the "*requisite intention"* namely "*to make a disposition the dominant purpose of which is to put the property which is the subject of that disposition beyond the reach of a person or a class of persons who is making, or may at some time make, a claim against him*". The dominant, indeed the only, purpose of the Bank was to get its money back. There is no evidence (or pleading) to the contrary and I can discern no basis upon which such an intention could be made out, particularly because disposing of the Property would not assist the Bank to avoid having to make payment in respect of any successful claim, which it could easily do from its own resources. And, even if the sale was at an undervalue, section 36 (C) (5) provides:

> *"For the avoidance of doubt it is hereby declared—*
>
> *(a) that a disposition to which this Part applies shall not, by reason only that it was made at an undervalue be set aside by the Court".*

The Bank's duties in respect of the sale price

56. On the particular facts of this case, the Bank, as mortgagee, managed to obtain a judgment in respect of the mortgage debt against Mrs. Trew, albeit that she was neither a mortgagor nor a surety for the mortgage debt. As explained further above, I have found that Equity would recognize that those exceptional circumstances give rise to her standing to claim that the mortgagee breached its duties in respect of the sale of the mortgaged property, notwithstanding her primary status as a beneficiary of the Estate. As to the sale price in the present case, the Judge considered and determined that "*the Bank complied with its duty to obtain the best price*" and that it did "*exercise good faith, fairness and reasonableness in the conduct of the sale of the Property.*"

57. Mussenden J combed through the evidence of the dilapidated state of the Property, relying on the affidavits sworn by Ms. Lavonne Brown of HSBC where she spoke about the necessity for HSBC to obtain a structural survey report in May 2018 from Mason and Associates Ltd. Ms. Brown's evidence was that the report estimated that the costs of the necessary remedial work on the property would be in the region of $885,000.00. An extract from the report, dated 24 May 2018, was quoted by the judge [16] as follows:

> "*The subject property is well below market condition with significant structural, electrical and plumbing concerns noted. Walkway supporting steel beams are severely corroded impacting the structural integrity of these two elements and should now be considered to be unsafe to access. Plumbing and electrical infrastructure is substandard and should all be replaced to code compliant safe, modern standards. Significant termite activity noted in the wood windows and door frames and upper level stud partition walls. Wood windows and some doors were noted to show significant rot and deterioration and should be replaced with new to match. West and north boundary stone wall/rock facings shows some undermining and localized erosion and should be strengthened*."

58. The Report contained an estimate of $ 855,000 for remedial costs. Mussenden J's ruling recorded that HSBC obtained three valuations on the Property from three separate appraisers in 2018 prior to placing it on the market. The appraisers' conclusions, lifted from paragraph 17 of Ms. Brown's Second Affidavit, are noted in the ruling as follows:

> "*a. The 27 June 2018 valuation by The Property Group stated that "neither building is up to code and that will require the wiring and plumbing", quoted estimated renovations costs at $500,000 and set a market value of $550,000.*
>
> *b. The 29 June 2018 valuation by MainPoint Real Estate ("MainPoint") found that "this property requires extensive renovation costs to make its operable [which renovations] are further hindered by the Grade 2 listing set on the property" and set a market value of $540,000; and*
>
> *c. The 5 September 2018 valuation by Rego Sothebys found that the "property needs a substantial amount of refurbishment [and] as an investment property, the capital expenditure required to repair the property may not be economically feasible in the short term" and set a value of $660,000*."

59. The Judge also had regard to the recommendation in each valuation for a structural survey to be undertaken due to its poor condition. The Property was sold by HSBC on 7 November 2018. The Bank's firm position was that it accepted the offer that produced the highest net sale value, notwithstanding that it also ultimately forgave the Trew Estate for over $80,000.00 in debt interest on the loan.

60. At paragraph 20 of Mussenden J's ruling, he set out the evidence of Ms Lavonne Brown in her second affidavit of 25 February 2021 detailing the negotiations which ensued between HSBC and various bidders for the sale of the Property:

> *"a. A real estate agent Alkon Realty inquired on behalf of an interested client Ms. B eventually making an offer on 6 and 7 August 2018 of $595,000 for the Property.*
>
> *b. The Bank engaged MainPoint to handle offers for the Property.*
>
> *c. On 7 August 2018, MainPoint received two formal offers for consideration:*

i. Coldwell Banker on behalf of their client, Mr. D, made an offer in the amount of $650,000; ii. Alkon Realty, on behalf of their client Ms. B, made an offer in the amount of $696,000; and iii. MainPoint was then instructed to request best offers from their clients.

d. On 7 August, Coldwell Banker's client increased their offer to $710,000, however, Alkon Realty's client did not modify their offer. The Bank accepted the offer of $710,000, but on 30 August 2018, the client reduced his offer to $550,000, based on details in the appraisal that revealed significant depreciated building cost. The offer was declined and the Property placed back on the market.

e. On 1 October 2018, MainPoint presented a cash offer of $500,000 from Mr. S for consideration. The Bank counter offered at $600,000 to which Mr. S countered at $525,000, which he increased to $ 560,000 gross on 3 (actually 9*) October 2018*[7] *and which was accepted by the Bank.*

f. On 17 October 2018, prior to entering a sales and purchase agreement with Mr. S, the Bank received another cash offer for $550,000 'net net' from Mr. G. The Bank then asked both potential purchasers for their best and final offers. On the same day, Mr. S advised that he did not wish to proceed with the purchase.

g. On 23 October 2018, the Bank proceeded with the offer from Mr. G, recognizing that due to the 'net net' offer from Mr. G, the offer would result in higher sale proceeds than the offer by Mr. S.

h. On 31 October 2018 Mr. S made a new offer of $575,000 gross which was declined by the Bank. On 1 November 2018 he upped his offer to $585,000 gross.

i. On 5 November 2018 the Bank finalized and exchanged a sales and purchase agreement with Mr. G.

j. On 5 November 2018 Mr. S made a new offer of $595,000 gross. The Bank decided to proceed with Mr. G's offer as the sales and purchase agreement was imminent and Mr. G was in a position to close the sale quickly, paying all associated costs. Further, the net sale proceeds would still be higher than Mr. S's offer and were in fact higher.

k. The $550,000 "net net" offer was greater because the buyer was paying the stamp duty of $16,000, the purchaser's legal costs in preparing the deed of conveyance of $9,600 and the agent's commission of $22,000. Therefore the "net net" offer amounted to a purchase price of $597,600 whereas Mr. S's last offer was $595,000. Mr. S had not offered to pay the entirety of the $22,000 commission all the legal fees, disbursements or stamp duty.

[7] The offer was subject to a number of conditions including a "*satisfactory planning search".*

> *l. On 7 November 2018 the sales and purchase agreement was executed and the sale closed on or about 27 June 2019*."

61. Having examined this detailed chronology Mussenden J concluded [68] "…*The decisions were a matter of simple mathematics in comparing offer prices to purchase the Property. On the basis that Mr. Scott is not challenging the factual basis of the offers, in my view he will be hard pressed to overcome the hurdle before him to show that the Bank did not exercise good faith, fairness and reasonableness in the conduct of the sale of the Property."*. From these early findings of fact, Mussenden J also rejected Mrs. Trew's allegations of "*collusion, possible corruption, asset manipulation and improper selection of purchasers by the Bank.*"

62. The figures did, indeed, in one sense, speak for themselves. But one of the offers was for $ 696,000 which was just short of $ 100,000 more than the net-net price. In her affidavit Ms Brown said that Alkon Realty did not modify that offer. If so, it remained at $ 696,000. And that offer was confirmed in an email of 7 August 2018 from Mrs B, on the basis that the legal costs would be split and the stamp duty shared 50/50, which is at pages 355/6 of the set of documents filed by the Bank, and which was forwarded by Alkon Realty to Mainpoint and to the Bank. Ms Brown does not give an explanation as to why that offer was not accepted, even though its existence was a critical point made in the affidavit of Mrs Trew of 5 February 2021 to which she was replying. In those circumstances it seems to me that Mrs Trew has an arguable claim against the Bank; and not one that can be said to have no realistic prospect of success.

63. On these grounds, I would be minded to grant leave to appeal on the limited basis of what, as set out in the preceding paragraphs, appears to me to be arguable and on the basis that the striking out of the claim pre-empted a trial on the merits of what is thus arguable. That is, however, subject to certain conditions. The Plaintiff needs to propose an amendment of paragraphs 1 – 11 of the Statement of Claim which takes account of the basis upon which I am minded to give leave. There is no need to refer to section 36 of the Conveyancing Act, which is not in the Statement of Claim, because Mrs Trew does not have a tenable claim under it. Any claim would be on the limited basis of a common law exception as discussed in [52] above and explained further below. But at least the following amendments appear to me to be necessary (reference to paragraph numbers is a reference to the existing pleading):

(a) In paragraph 7 the Sale and Purchase Agreement is dated December 2018 when it was made on 7 November 2018;

(b) The contentions in paragraph 8 have been abandoned and the paragraph should, therefore be removed.

(c) In paragraphs 9 and 10 the essence of what is alleged is that the Bank refused to accept "*the higher offers*". The highest actual offer by Mr S was $ 595,000, which

was not in fact as high in value as the net-net offer. However, in her affidavit Mrs. Trew relies on a further actual offer of $ 696,000. It is the failure to accept this offer that needs to be pleaded.

(d) I do not understand why paragraph 10 (i) includes reference to Mrs Trew's "*ability under the terms of clause 6 (b) of the will to discharge certain indebtedness". .. The co*mplaint is that the sale of the Property was at less than its proper value. This would appear to have nothing to do with clause 6 (b) of the Will

(e) I also do not understand what paragraph 10 (ii) is intended to cover insofar as the Bank is concerned. The sub-paragraph complains of prejudice suffered by the accrual of interest. This would appear to be based on the proposition that there should have been an earlier sale of the Property. But the mortgagee Bank was not bound to exercise its power of sale. And the reliance on clauses 6 (a) and (b) appear only to be applicable to the Second Defendant. I would have thought it better to leave reference to these clauses out of this sub-paragraph since they appear to me inapplicable to the claim against the First Defendant. Moreover, if the sale were found to have been at an undervalue, the Court would be able on that basis to assess whether or not interest should be allowed to have accrued from the date of sale.

(f) In paragraph 11 the main claim is for the loss of value on the deal of $ 425,917.28. This figure appears to be a minor miscalculation. But more importantly Mrs Trew's loss cannot be the whole of what she says the Property should have been sold for; but only the difference between the latter amount and what was actually received, which if the $ 696,000 figure is to be used would appear to be $ 146,000 ($ 696,00 - $ 550,000) Further it is not clear to me how, if at all, items (ii) to (v) relate to claims against the Bank.

(g) The pleading needs to make clear that the Plaintiff brings the claim both in her own right and on behalf of the Estate. More so, it needs to plead that judgment was entered against her pursuant to the Originating Summons and that in those circumstances the Bank treated her as some form of surety and therefore owed her the duty of a mortgagee to a surety.

64. I would, therefore, invite the Plaintiff to produce an amended Statement of Claim. When that has been done, we can, after receiving any submissions that the Bank wishes to make, finally decide whether to grant leave to amend and leave to appeal. If and to the extent that we grant leave to appeal that would mean only that an appeal against the ruling of Mussenden J would fall to be heard on the grounds in respect of which we had given leave. Since, if we finally grant leave, we will have determined, after significant written submissions, that the amended claim is arguable we shall, in effect have determined the outcome of the appeal for which leave is given. (We could be said to have decided only that the claim was arguably arguable, but that tautology alone shows the unviability of such a suggestion). In those circumstances, if we grant leave, we

would be minded, subject again to any submissions that the Bank would wish to make, to treat the application to us as a rolled up hearing and determine on the papers) both leave to appeal and the outcome of the appeal against strike out.

65. The Plaintiff should produce any proposed amendment within 21 days of the handing down of this Ruling.

66. Ground 5 alleges that the Judge erred in law in holding at paragraph [67] that the duty of the Bank owed to the mortgagor was to inform the Second Defendant (i.e. the Executor) about the details of the sale and forward the surplus to the estate. That *was* a duty of the Bank. I suspect that the point that is intended to be made is that this was a duty owed to Mrs. Trew as well. I have dealt with this contention above. Ground 6 is a connection that the Judge erred at paragraph [68] in holding that the Bank's decisions were a matter of simple arithmetic. Ground 8 contends that the Judge erred in holding that the Bank complied with its duty to obtain the best price based on a comparison between the net- net and gross offers. As to that, there seems to be no basis for saying that a mathematical comparison was in some way wrong. Unless there is some valuable term in the lower, or some prejudicial term in the higher price offer, the question of what is the best price is answered by asking which price is the highest. The better point is that the judge appeared to take no account of the existence of a gross offer which was better (mathematically) than the net-net offer.

67. The Court reserves for further consideration all questions as to what order shall be made in relation to the costs of the application and of the proceedings below.

SMELLIE, JA

68. I agree and would only add that in any response; the Bank is obliged to give full and frank disclosure in relation to the offer of $696,000 which it did not accept.

SIR CHRISTOPHER CLARKE P

69. I, also, agree.